

STATE OF OHIO                    )  
  )ss:  
COUNTY OF WAYNE            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       18AP0003

Appellee

v.

MICHAEL L. TISCH

APPEAL FROM JUDGMENT  
ENTERED IN THE  
WAYNE COUNTY MUNICIPAL COURT  
COUNTY OF WAYNE, OHIO  
CASE No.     2017 TR-C 008013

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 31, 2018

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CALLAHAN, Judge.

{¶1} Appellant, Michael Tisch, appeals an order that denied his motion to suppress.

This Court affirms.

I.

{¶2} Trooper Justin Ross initiated a traffic stop of Mr. Tisch’s vehicle after he observed the vehicle travel over the center lane of State Route 585 shortly after 1:00 a.m. on August 5, 2017. Trooper Ross noted that Mr. Tisch’s eyes were glassy, red, and bloodshot; that his speech was slurred; and that an odor of alcohol emanated from the vehicle. Based on these observations, he performed field sobriety tests alongside the roadway in front of his cruiser. Trooper Ross noted numerous clues during administration of the tests.

{¶3} Mr. Tisch was charged with operating a vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a) and with operating a vehicle with a prohibited blood alcohol concentration in violation of R.C. 4511.19(A)(1)(d). He moved to suppress all of

the evidence gained as a result of the traffic stop and, in the alternative, argued that Trooper Ross did not have reasonable suspicion to support the administration of the field sobriety tests and did not administer the tests in substantial compliance with the National Highway Transportation and Safety Administration (“NHTSA”) guidelines. Mr. Tisch also argued that his arrest was not justified by probable cause. The trial court denied the motion to suppress, and Mr. Tisch pleaded no contest to the charges. The trial court found him guilty of driving while under the influence of alcohol, dismissed the remaining charges, sentenced him to three days in jail, imposed a twelve-month license suspension, and fined him \$600. Mr. Tisch filed this appeal.

## II.

### ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY DENYING MR. TISCH’S MOTION TO SUPPRESS, AS THE FIELD SOBRIETY TESTS WERE NOT CONDUCTED IN SUBSTANTIAL COMPLIANCE WITH THE 2015 NHTSA MANUAL.

{¶4} Mr. Tisch’s first assignment of error is that the trial court erred by denying his motion to suppress because the State failed to establish which version of the NHTSA standards were at issue and, in the alternative, because Trooper Ross failed to conduct the tests in substantial compliance with the NHTSA standards. This Court disagrees.

{¶5} Mr. Tisch properly raised these issues in a motion to suppress. *See State v. Spees*, 9th Dist. Medina No. 17CA0061-M, 2018-Ohio-2568, ¶ 16-28. *Compare State v. Baker*, 146 Ohio St.3d 456, 2016-Ohio-451, ¶ 23, citing *State v. French*, 72 Ohio St.3d 446 (1995), paragraph one of the syllabus (a defendant who fails to raise substantial compliance with the procedures for collecting a sample for a breathalyzer test in a motion to suppress waives the requirement that the state lay a foundation for admissibility at trial.) *See also Defiance v. Kretz*, 60 Ohio St.3d 1, 3-4 (1991) (concluding that the admissibility of breathalyzer tests is properly

raised in a motion to suppress). Therefore, this Court’s review of the trial court’s ruling on the motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. The trial court acts as the trier of fact during a suppression hearing and is best equipped to evaluate the credibility of witnesses and resolve questions of fact. *Id.*; *State v. Hopfer*, 112 Ohio App.3d 521, 548 (2d Dist.1996), quoting *State v. Venham*, 96 Ohio App.3d 649, 653 (4th Dist.1994). Consequently, this Court accepts a trial court’s findings of fact if supported by competent, credible evidence. *Burnside* at ¶ 8. Once this Court has determined that the trial court’s factual findings are supported by the evidence, we consider the trial court’s legal conclusions de novo. *See id.* In other words, this Court then accepts the trial court’s findings of fact as true and “must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 710 (4th Dist.1997).

{¶6} Under R.C. 4511.19(D)(4)(b), an officer may testify about the results of field sobriety tests and the state may introduce the results as evidence in any criminal prosecution for a violation of R.C. 4511.19(A) or (B) “if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including \* \* \* any testing standards then in effect that were set by the national highway traffic safety administration[.]” The State must demonstrate substantial compliance by clear and convincing evidence. *State v. Reddington*, 9th Dist. Medina No. 14CA0064-M, 2015-Ohio-2890, ¶ 19; R.C. 4511.19(D)(4)(b).

{¶7} Mr. Tisch’s first argument is that the State failed to establish which version of the NHTSA standards were at issue during the hearing on his motion to suppress. During the

hearing, the trial court took judicial notice of the “most recent” NHTSA manual, and the consensus among counsel and the trial court was that the most recent version at the time was published in 2015.<sup>1</sup> Mr. Tisch did not raise any objection to the NHTSA manual, and his trial counsel introduced the relevant pages of the 2015 manual into evidence. In addition, the complete 2015 NHTSA manual is part of the record.

{¶8} With respect to the horizontal gaze nystagmus (“HGN”) tests, Mr. Tisch has argued that Trooper Ross did not substantially comply with the NHTSA standards because he failed to ask whether Mr. Tisch suffered from any health conditions that might make the testing unreliable, performed the tests with Mr. Tisch facing oncoming traffic, and failed to complete the second pass of the test measuring onset of nystagmus at fewer than forty-five degrees.

{¶9} As the trial court found, Trooper Ross did not ask whether Mr. Tisch had any medical conditions that could inhibit his ability to perform the tests. The NHTSA standards referenced at the hearing provide that “Officers are reminded to ask questions about the subject’s eye and general health conditions prior to administering the HGN test.” The same standard also contemplates “pre-test” checks and provides that an officer “may choose not to continue with the testing.” Functionally, Trooper Ross substantially complied with this standard by performing threshold testing to determine whether Mr. Tisch’s eyes exhibited equal pupil size and tracking: Trooper Ross testified that he used that test to look for indications of a medical condition or medication that would impair a subject’s ability to test. According to Trooper Ross, Mr. Tisch exhibited no such signs.

{¶10} Mr. Tisch’s second argument is that Trooper Ross incorrectly administered the HGN tests with Mr. Tisch facing oncoming traffic. The NHTSA training manual explains that

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<sup>1</sup> The NHTSA manual has since been updated again.

nystagmus can result from neural activity occasioned by “watching strobe lights, rotating lights, or rapidly moving traffic in close proximity.” According to the NHTSA manual, this kind of “optokinetic nystagmus” does not affect a properly administered HGN test. The trial court in this case found that there was some oncoming traffic present during the administration of the HGN test to Mr. Tisch, but it was not “rapidly moving.” This finding is supported by Trooper Ross’s testimony and by the dashboard camera video admitted into evidence, which demonstrates that oncoming traffic was light, that it travelled at a slow speed as it approached the intersection and as it maneuvered past the traffic stop, and that Mr. Tisch’s view of the approaching vehicles was blocked in large measure by his own pickup truck.

{¶11} Mr. Tisch’s final argument with regard to the administration of the HGN tests is that Trooper Ross failed to complete two passes to the right while testing for the onset of nystagmus prior to 45 degrees. The NHTSA manual explains that “[o]nset of nystagmus prior to 45 degrees is another clue of impairment” and instructs officers to “immediately stop moving the stimulus and hold it steady” at the position at which nystagmus begins. The record in this case supports the trial court’s conclusion that the final pass to the right is partially blocked from view by Mr. Tisch’s body, and Trooper Ross explained that the length of time required for each pass and the distance that his hand must travel varies based on the subject’s reaction to the stimulus. In other words, according to Trooper Ross’s testimony, he concludes a pass at the point at which the subject exhibits nystagmus without extending the stimulus to the full 45 degrees, as provided by the NHTSA manual. The trial court did not err by concluding that Trooper Ross substantially complied with the NHTSA manual in this respect.

{¶12} Mr. Tisch has also argued that the trial court’s conclusion that Trooper Ross administered the walk-and-turn and one-legged stand tests on a level surface is not supported by

the record. Specifically, he maintains that his own calculations and a photograph of the scene that he took illustrates “that the area of Benner [Road] where Mr. Tisch performed the tests was severely sloped.” The trial court noted, however, that “Trooper Ross testified the area was flat or was as flat as possible” and noted that Mr. Tisch offered no foundation for his calculations regarding the slope of the hill.

{¶13} The evidence supports the trial court’s findings in this regard. The dashboard camera video from Trooper Ross’s cruiser depicts the area of the traffic stop as mostly level, in contrast to the photograph that Mr. Tisch submitted, which depicts a steep grade at the intersection of two roads. Indeed, it appears that the video and the photograph represent two entirely different locations: in addition to the visible slope, the photograph contains a double yellow center line and white edge lines that are not evident in the video, but does not depict a guardrail or an illuminated structure, both of which are clearly visible to the left in the video.

{¶14} The trial court did not err by concluding that Trooper Ross administered the field sobriety tests in substantial compliance with the NHTSA manual, and Mr. Tisch’s first assignment of error is overruled.

## **ASSIGNMENT OF ERROR NO. 2**

THE TRIAL COURT ERRED BY DENYING MR. TISCH’S MOTION TO SUPPRESS, AS THERE WAS NO PROBABLE CAUSE TO ARREST MR. TISCH.

{¶15} Mr. Tisch’s only argument in his second assignment of error is that without Trooper Ross’s observations based on the field sobriety tests, he lacked probable cause to arrest Mr. Tisch. In other words, Mr. Tisch’s second assignment of error is premised on the assumption that this Court would sustain his first. Because this Court has overruled his first assignment of error, his second assignment of error is moot. *See App.R. 12(A)(1)(c).*

## III.

{¶16} Mr. Tisch's first assignment of error is overruled. His second assignment of error is moot. The judgment of the Wayne County Municipal Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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LYNNE S. CALLAHAN  
FOR THE COURT

TEODOSIO, P. J.  
CONCURS.

CARR, J.  
CONCURRING.

{¶17} While I agree with the majority’s analysis, I am troubled by the fact that the trial court did not issue a written entry with factual findings in denying the motion to suppress. Although the trial court’s oral findings were sufficient in this particular case to allow for our review, the best practice is to set forth those findings in a journal entry. *See generally State v. Purefoy*, 9th Dist. Summit No. 27992, 2017-Ohio-79, ¶ 18 (noting that the trial court must set forth adequate factual findings that show the basis for its ruling on a motion to suppress).

APPEARANCES:

PATRICK L. BROWN, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and ANDREA D. UHLER, Assistant Prosecuting Attorney, for Appellee.